UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JODY BUCKNER, Petitioner, v. DOUG WADDINGTON, Respondent.	CASE NO. C04-1983-RSL REPORT AND RECOMMENDATION

Petitioner is proceeding *pro se* in this 28 U.S.C. § 2254 action. He is currently in custody at the Stafford Creek Corrections Center due to his 2001 conviction on two counts of delivery of cocaine and one count of possession with intent to manufacture or deliver cocaine. Petitioner raises three grounds for relief. (Dkt. 6.) The petition is now ripe for consideration. Respondent filed an answer to the petition with relevant portions of the state court record, including trial transcripts. (Dkts. 9 & 10.) Respondent argues that petitioner failed to properly exhaust his claims and that all three of his claims lack merit. (Dkt. 9.) Petitioner filed a traverse to the answer. (Dkt. 14.)

The Court has considered the record relevant to the grounds raised in the petition, including all hearing transcripts. For the reasons discussed herein, it is recommended that the petition be DENIED and this action dismissed.

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I. Factual Background

The Washington Court of Appeals, Division I, summarized the facts and procedural posture of petitioner's case as follows:

> In May 2000, Harry Davis entered into a deal with the Valley Narcotics Enforcement Team (VNET) to work off his drug dealing charges. Davis told Detective Robert Jones that he had information about a drug dealer named Jody Buckner. At Detective Jones's request, Davis contacted Buckner.
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> On May 18, 2000, Buckner paged Davis and Davis called him back. When Davis told Buckner that he wanted to meet him, Buckner asked how much Davis needed. As per Detective Jones's instructions, Davis told Buckner that he wanted to buy a half ounce of powder cocaine. Buckner quoted a price of $340. He named a meeting spot and told Davis that he would be driving a gray Mercury Cougar.
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> Detective Jones gave Davis prerecorded buy money and drove him to the meeting spot, where they saw the gray Mercury Cougar. Davis got into the car with Buckner and came back with a bag of cocaine. Police followed Buckner's car to 10041 63rd Avenue South in Seattle. The house was leased by Buckner's ex-wife, Debra Avery. Parked outside of the house was a red Honda Prelude registered to Buckner and Avery. The gray Mercury Cougar was registered to Buckner's mother.
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> On May 23, 2000, Detective Jones contacted Davis and asked him to arrange another drug purchase with Buckner. Detective Jones set up a three-way call between Davis and Buckner, wherein Buckner identified himself as "Jody." Davis told Buckner that he wanted to buy another half ounce of cocaine, and Buckner again quoted a price of $340. They set up a meeting spot, and Buckner told Davis that he would be driving a red Honda Prelude.
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> While Detective Jones strip searched Davis, gave him buy money, and drove him to the meeting location, another detective was conducting surveillance outside Avery's house. He watched Buckner enter the red Honda Prelude and drive to the prearranged meeting spot. Detective Jones saw Davis get into Buckner's car and observed a hand-to-hand exchange between the two. Davis returned to Detective Jones's car and handed him two bags of rock cocaine.
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> Based on these facts, Detective Jones obtained a search warrant for Avery's house. On May 25, 2000, officers executed the warrant and arrested Buckner. They found two bags containing 8.1 grams of crack cocaine in his pocket. When Buckner was asked if there were any drugs in the house, he directed the officers to 6.5 grams of powder cocaine he had stored in the kitchen cupboard. The officers seized a measuring cup containing cocaine residue and scales. Buckner told the officers there was a gun in the top drawer in the bedroom and a gun in the bedroom closet. The officers also found numerous items of men's clothing, mail addressed to Buckner, and Buckner's birth certificate in the house.
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> At trial, Buckner claimed that he was not the person who had sold cocaine to Davis. He testified that a man named Dwight Summers used his name as an alias, and that he and Summers looked very similar. Buckner also claimed that Summers was a cocaine dealer, and that he believed that Summers was staying with Avery in May

2000. He admitted to being in possession of the drugs found on his person, but claimed they were for personal use.

A jury convicted Buckner as charged. The trial court imposed a standard range sentence including community placement of 12 months, or the entire period of earned release, whichever is longer.

(Dkt. 10, Ex. 3, at 2-4.)

When petitioner appealed his conviction to the Washington Court of Appeals, he was represented by counsel and raised the following assignments of error:

1. The trial court's erroneous evidentiary rulings denied appellant his right to present a defense.

2. The court's erroneous and inconsistent rulings created at least the appearance of bias and denied appellant a fair trial.

3. Prosecutorial misconduct in closing argument denied appellant a fair trial.

4. The court's failure to specify the period of appellant's community placement requires remand.

(Dkt. 10, Ex. 2, at 1.) The Court of Appeals affirmed petitioner's conviction and sentence in an unpublished decision. (Dkt. 10, Ex. 3.); *see also State v. Buckner*, 2003 WL 1748389 (Wn. App. Mar. 31, 2003).

Proceeding *pro se*, petitioner sought review in the Washington Supreme Court. (Dkt. 10, Ex. 4.) He raised the following grounds for relief:

1. The trial court's erroneous evidentiary rulings denied appellant right [t]o present a defense;

2. The court's erroneous and inconsistent rulings created at least the [a]ppearance of bias, and denied appellant a fair trial;

3. Prosecutorial misconduct in closing argument denied appellant a fair trial;

4. The court failure to impose the DOSA Program as directed by Judge;

5. Incompetence Defense Attorney Phil Mahoney;

6. Attorney Client Relationship violated;

7. Judge Haley incompetence under the Cannons Index that cover judgeships [l]ending his office to be impartial;

8. Perjury by law enforcement officers whom at will lied on the witness [s]tand.

9. Professional witness to establish large or small quantities of drugs is [y]et to be established.

10. Malicious prosecution by prosecutor whom influence judge's decision to [b]e bias;

11. State failed to show cause why appellant did not qualified for the DOSSA.

12. State failed to show a twenty year friend relationship between informant [a]nd appellant.

(Dkt. 10, Ex. 4.) The state Supreme Court denied review on November 4, 2003. (Dkt. 10, Ex. 5).

II. Claims for Relief

In his habeas petition in this Court, petitioner raises the following grounds for relief:

1. The Trial Court erroneous exclusion of relevant evidence To Wit: denied Buckner his right to testify, denied him his right to constitutionally present a defense.

2. The Court was either Biased or Created the Appearance of bias which deprived the petitioner of his right to a fair trial.

3. The prosecutor committed misconduct during his closing arguments thus, denying him his right to a fair trial.

(Dkt. 6.) Respondent asserts that petitioner failed to properly exhaust his claims and has now procedurally defaulted on his claims. Respondent further argues that all of petitioner's claims lack merit. The Court will address respondent's exhaustion and procedural bar argument first.

III. Exhaustion of State Remedies

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). To exhaust state remedies, a petitioner must present each of his claims to the state's highest court. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). A petitioner must "alert the state courts to the fact that he was asserting a claim under the United States Constitution." *Hiivala v. Wood*, 195

F.3d 1098, 1106 (9th Cir. 1999) (citing *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995)). "The mere similarity between a claim of state and federal error is insufficient to establish exhaustion." *Id.* (citing *Duncan*, 513 U.S. at 366). "Moreover, general appeals to broad constitutional principles, such as due process, equal protection, and the right to a fair trial, are insufficient to establish exhaustion." *Id.* (citing *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996)).

In this case, respondent does not dispute that petitioner adequately presented the claims raised in this petition as federal constitutional violations in his briefing before the Washington Court of Appeals. (Dkt. 9, at 11.) However, respondent maintains that petitioner "failed to properly exhaust the claims by not presenting any of them as federal constitutional violations to the Washington Supreme Court." *Id.*

The Court disagrees that petitioner failed to exhaust his claims with the Washington State Supreme Court. To be sure, the *pro se* petition for review and other materials that petitioner filed with the state supreme court were rather difficult to comprehend and were not well-organized. (Dkt. 4.) However, petitioner did provide the state supreme court with relevant portions of the brief that he had filed with the state court of appeals. *Id.* That brief presented his claims as federal constitutional violations.

In *Insyxiengmay v. Morgan*, ___ F.3d ____, 2005 WL 712483 (9th Cir. Mar. 30, 2005), the Ninth Circuit recently considered arguments similar to those raised by respondent in this case. In *Insyxiengmay*, the petitioner did not explicitly raise federal constitutional claims in the body of a motion for review that he filed with the state supreme court. However, the petitioner in that case presented his constitutional claims to the state supreme court in an appendix attached to his motion. The Ninth Circuit noted that the appendix "contained, *inter alia*, [petitioner's] arguments regarding the three claims that the state contends are not exhausted. All three arguments contained the requisite references to the pertinent provisions of the United States Constitution." *Id.* at *9. Therefore, the Ninth Circuit concluded that the petitioner had "clearly presented all three claims as federal issues to the Washington Supreme Court." *Id.*

The Ninth Circuit further noted:

> The State argues that, because Insyziengmay's discussion of the three claims does not appear in the body of the motion, Washington law prohibits their consideration. It asserts that Washington courts do not permit "incorporation" in motions, briefs, or petitions of material contained in the appendices to those documents. All the cases cited by the State in support of its argument involve briefs or other filings that raise issues by incorporation by reference of another document not before the appellate court, generally trial memoranda. *See, e.g., State v. Kalakosky*, 852 P.2d 1064, 1072 n.18 (Wash. 1993). In other words, those cases prohibit incorporation of material that has *not* been filed with the court itself. *See id.* ("Only issues . . . argued to the appellate court are considered on appeal."). Here, in the appendix filed in the state supreme court along with his motion, Insyxiengmay presented extensive argument in support of all three claims as well as citations to the requisite authority and to relevant parts of the record. Accordingly, the claims were fairly and fully presented to the Washington Supreme Court.

Id.

Similarly, in this case petitioner presented the state supreme court with portions of the brief that he had previously filed with the state court of appeals. Those portions of the brief contained citations to federal cases and constitutional provisions related to the three claims that he raises in his habeas petition. Under these circumstances, the Court finds that petitioner adequately exhausted his claims in state court.

IV. Merits of Petitioner's Claims

This Court's review of the merits of petitioner's claims is governed by 28 U.S.C. § 2254(d)(1). Under that standard, the Court cannot grant a writ of habeas corpus unless a petitioner demonstrates that he is in custody in violation of federal law and that the highest state court decision rejecting his grounds was either "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(a) and (d)(1). The Supreme Court holdings at the time of the state court decision will provide the "definitive source of clearly established federal law." *Van Tran v. Lindsey*, 212 F.3d 1143, 1154 (9th Cir. 2000), *overruled in part on other grounds by Lockyer v. Andrade*, 538 U.S. 63 (2003).

In his traverse, petitioner appears to suggest that the Washington Court of Appeals erred

because it did not discuss provisions of the federal constitution or cite United States Supreme Court precedent in its decision. However, the United States Supreme Court previously rejected this argument in a an appeal from a decision by the Ninth Circuit:

> [T]he Ninth Circuit observed that the state court "failed to cite . . . any federal law, much less the controlling Supreme Court precedents." If this meant to suggest that such citation was required, it was in error. A state-court decision is "contrary to" our clearly established precedents if it "applies a rule that contradicts the governing law set forth in our cases" or if it confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." Avoiding these pitfalls does not require citation of our cases – indeed, it does not even require *awareness* of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them.

Early v. Packer, 537 U.S. 3, 8 (2002) (internal citations omitted) (emphasis in original).[1] As such, the Washington Court of Appeals was not required to analyze federal constitutional law or Supreme Court precedent. Petitioner still bears the burden of showing that the decision of the Washington Court of Appeals is contrary to clearly established precedents of the United States Supreme Court.

A. Constitutional Right to Present a Defense

Petitioner first argues that he was denied his constitutional right to present a defense when the trial court prevented him from offering certain testimony. This claim appears to relate only to petitioner's conviction of possession with intent to manufacture or deliver cocaine. The Washington Court of Appeals found as follows on this issue:

> With regards to the charge of possession with intent to deliver cocaine, Buckner admitted that he was in possession of cocaine. But he claimed that he was a cocaine addict, and that the cocaine was for his own personal use. The defense called Buckner's chemical dependency counselor, Ed Mosshart, as a witness. But Mosshart testified that he was only treating Buckner for alcohol and marijuana dependency, not cocaine addiction. He further testified that Buckner disclosed that he had not used cocaine since the age of eighteen.
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> Buckner testified on his own behalf and claimed that he was a cocaine addict, and that during the time period of his arrest he would use cocaine on nearly a daily

[1] The Supreme Court's decision in *Early* reversed the Ninth Circuit's decision in *Packer v. Hill*, 277 F.3d 1092 (9th Cir. 2002), a case that petitioner appears to rely upon in support of his argument that the Washington Court of Appeals erred because it did not cite federal law or Supreme Court precedent in its decision. (Dkt. 14, at 5.)

> basis. To rebut his treatment provider's testimony, Buckner's attorney asked him whether his employer had told him anything about the effect cocaine use would have on his employment. The State objected on the basis of relevance and hearsay.
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> In a discussion outside the presence of the jury, Buckner's attorney indicated that Buckner would testify that his employer told him that he would be fired if he was using cocaine. The State argued that the defense was using this statement to rehabilitate its own witness, and that whether or not Buckner was an addict was not relevant. The court ruled that this testimony was not relevant, and further that if the statement were being offered for its truth, it would constitute hearsay. Buckner's attorney countered that the statement was not being offered for its truth, but rather for its effect on Buckner. The court again ruled that the testimony was not relevant and sustained the State's objection.
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> Buckner argues that the trial court's ruling was in error because the testimony was relevant, and did not constitute hearsay. On appeal, the State agrees that the statements offered did not constitute hearsay, and concedes that the trial court erred in excluding the testimony, but argues that the error was harmless. The State does not address the relevance of the testimony.
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> The State's concession is not well taken. The trial court did not rule that the employer's statements were hearsay, but rather that the statements would be hearsay if offered for the truth of the matter asserted. This was not error.
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> Nor did the trial court err in ruling that the testimony was not relevant. A trial court's evidentiary ruling regarding relevance will not be reversed absent a manifest abuse of discretion. Evidence is relevant if it has a tendency "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."
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> Buckner argues that the testimony that he was a cocaine addict was relevant in that it would tend to make it more likely that he possessed cocaine for personal use, rather than with the intent to deliver. Arguably, testimony that Buckner was in treatment for cocaine addiction could be seen as relevant, in that it would bolster his claim that he was addicted. But Buckner was*not* being treated for cocaine addiction, and had in fact told his treatment provider that he had not used cocaine in years. Buckner's explanation for why he did not seek treatment, and why he apparently lied to his treatment provider was not relevant in that it would not have made any fact that was of consequence to the determination of the action more probable or less probable than it would have been without the evidence. The trial court therefore did not err in excluding the testimony as irrelevant.

(Dkt. 10, Ex. 3, at 3-6) (internal citations omitted) (emphasis in original).

Petitioner argues that the exclusion of his testimony that his employer told him that he would be fired if he used cocaine deprived him of his constitutional right to testify and to present a defense. (Dkt. 6.) In their pleadings, the parties invoke different standards to evaluate whether the exclusion of this testimony violated petitioner's rights under clearly established federal law.

Respondent argues that because petitioner is challenging an evidentiary ruling, this claim should be evaluated under factors set forth in *Tinsley v. Borg*, 895 F.2d 520, 530 (9th Cir. 1990). In his traverse, petitioner disputes that *Tinsley* is applicable and relies primarily on the United States Supreme Court's decision in *Rock v. Arkansas*, 483 U.S. 44 (1987), to support this claim. Under either analysis, however, petitioner's claim should be dismissed.

In *Rock v. Arkansas* , the Court noted the well-established rule that "a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense." *Rock*, 483 U.S. at 49. However, *Rock* does not establish a constitutional right for a criminal defendant to present irrelevant testimony. *See, e.g., United States v. Moreno*, 102 F.3d 994, 999 (9th Cir. 1996) ("While the constitutional right to testify permits a defendant to choose whether or not to testify, it does not authorize a defendant to present irrelevant testimony.") Indeed, the *Rock* Court noted that a criminal defendant's right to present even relevant testimony is "not without limitation" and "'may in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.'" *Rock*, 483 U.S. at 55 (*citing Chambers v. Mississippi*, 410 U.S. 284, 295 (1973)). Instead, the Court held that "restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve." *Rock*, 483 U.S. at 55-56.

Here, petitioner was not arbitrarily prevented from testifying that his employer had told him that he would be fired if he used cocaine. After petitioner sought to introduce such testimony, the trial court held an extended colloquy with the parties outside the jury's presence and gave petitioner's counsel an opportunity to explain the relevance of the testimony. (Dkt. 10, Ex. 14, at 89-95.) The trial court also offered petitioner's counsel the opportunity to present case law to support his argument. (*Id.* at 93-94.) Under these circumstances, petitioner was not arbitrarily denied the right to present testimony on this point. *See, e.g., Williams v. Borg*, 139 F.3d 737, 740 (9th Cir. 1998) (noting that "'[a]rbitrary in this context means without a basis in reason or law"). In addition, the exclusion of this particular testimony on relevance grounds was not a

disproportionate ruling. The exclusion of petitioner's testimony was narrow, and trial courts have wide latitude to exclude evidence that is only marginally relevant. *Crane v. Kentucky*, 476 U.S. 683, 689 (1986). As such, the Washington Court of Appeals' decision is not contrary to clearly established federal law as established by *Rock v. Arkansas*.

Even if the trial court's evidentiary ruling on this matter was incorrect, such an error does not automatically provide a basis for habeas relief. "It is well settled that a state court's evidentiary ruling, even if erroneous, is grounds for federal habeas relief only if it renders the state proceedings so fundamentally unfair as to violate due process." *Spivey v. Rocha*, 194 F.3d 971, 977 (9th Cir. 1999); *see also Tinsley v. Borg*, 895 F.2d 520, 530 (9th Cir. 1990) (a "state court's decision to exclude certain evidence must be so prejudicial as to jeopardize the defendant's due process rights"). To determine whether the exclusion of evidence reaches constitutional proportions, the Court considers five factors:

> (1) the probative value of the excluded evidence on the central issue; (2) its reliability; (3) whether it is capable of evaluation by the trier of fact; (4) whether it is the sole evidence on the issue or merely cumulative; and (5) whether it constitutes a major part of the attempted defense.

Tinsley, 895 F.2d at 530.

Here, the trier of fact would be capable of evaluating petitioner's testimony that his employer would have fired him if he had been using cocaine. However, the remaining factors do not weigh in favor of petitioner.

First, the excluded evidence was not of significant probative value to the central issue of whether petitioner possessed cocaine with an intent to deliver or manufacture. At most, this testimony may have provided a reason why petitioner had not reported his alleged cocaine use to his chemical dependency counselor. In turn, this may have added support to petitioner's claim that he was a cocaine addict at the time of his arrest, which in turn may have bolstered petitioner's claim that the cocaine in his possession at the time of his arrest was for personal use. Under these circumstances, the probative value of the excluded testimony was tenuous at best.

In addition, the excluded evidence was not the sole evidence that petitioner presented to defend against the charge of possession with intent to manufacture or deliver cocaine. Petitioner testified at trial that the cocaine found on his person at the time of his arrest was for personal use. (Dkt. 10, Ex. 14, at 96.) He also testified that he was using cocaine almost on a daily basis at the time of his arrest. (*Id.* at 88.) He also testified that he was an addict. (*Id.* at 115.)

Similarly, the excluded testimony cannot be regarded as a major part of petitioner's defense. The excluded testimony apparently related to one of the three charges against petitioner, possession with intent to manufacture or deliver. Petitioner sought to defend against this charge by showing that he was a cocaine addict and that the two bags of cocaine found on his person at the time of his arrest were for his personal use. As noted above, petitioner testified regarding his alleged addiction and his personal use of cocaine, and the probative value of the excluded testimony was not great.

Furthermore, it does not appear that the reliability of this testimony would be strong. It appears that this testimony would have been a self-serving attempt by petitioner to explain why, as the state court of appeals noted, he "apparently lied to his treatment provider" about his alleged cocaine use. (Dkt. 10, Ex. 3, at 6.) Though not raised by respondent, the Court also notes that petitioner's counsel represented to the trial court outside the presence of the jury that Mr. Mosshart, petitioner's chemical dependency counselor, "would be testifying to treating Mr. Buckner for his addiction to cocaine during this time frame." (Dkt. 10, Ex. 14, at 54-55.) Mr. Mosshart then took the stand and repeatedly testified that he did not treat Mr. Buckner for cocaine addiction. *See*, e.g., *id.* at 66, 70, 76. These circumstances may suggest that petitioner's excluded testimony was developed in order to address unexpected testimony by Mr. Mosshart.

As such, petitioner has not demonstrated that the Washington Court of Appeals's decision regarding the exclusion of this testimony was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. Therefore, the Court recommends that habeas relief as to petitioner's first ground for relief be

denied.

B. Judicial Bias

In his second ground for relief, petitioner argues that he was deprived of his right to a fair trial because the trial court was "either Biased or Created the Appearance of bias" against him. (Dkt. 6). The Washington Court of Appeals addressed this allegation as follows:

> Buckner next argues that the trial court was either biased against him, or created the appearance of bias, and that he was therefore deprived of a fair trial. This claim is meritless. There is a presumption against a finding of bias. A party who alleges bias or prejudice must support the claim with evidence before the appearance of fairness doctrine will be applied. Buckner alleges that the court's ruling tended to favor the State. But Buckner alleges no evidentiary errors, aside from the claim of error that we rejected above. And Buckner has presented no evidence of the trial judge in the proceedings or the parties that would establish that the judge was actually or potentially biased. Buckner's claim of bias fails for a want of evidence.

(Dkt. 10, Ex. 3, at 6-7) (internal citations omitted).

To determine whether petitioner is entitled to habeas relief on this claim, the relevant inquiry is "whether the state trial judge's behavior rendered the trial so fundamentally unfair as to violate federal due process under the United States Constitution." *Duckett v. Godinez*, 67 F.3d 734, 740 (9th Cir. 1995). Here, petitioner has not offered sufficient evidence to support such a finding.

Petitioner points to alleged errors by the trial court in evidentiary rulings and in overruling petitioner's objections at trial. However, these examples do not reveal judicial bias or the appearance of judicial bias against him. A reviewing court in a habeas case must "abide by the general presumption that judges are unbiased and honest." *Ortiz v. Stewart*, 149 F.3d 923, 938 (1998); *see also Winthrow v. Larkin*, 421 U.S. 35, 47 (1975) (to succeed on judicial bias claim, petitioner must "overcome a presumption of honesty and integrity in those serving as adjudicators"). Moreover, "judicial rulings alone almost never constitute a valid basis" for finding judicial bias. *Liteky v. United States*, 510 U.S. 540, 555 (1994); *see also Poland v. Stewart*, 117 F.3d 1094, 1103 (9th Cir. 1997) (same). In addition, this Court's review of the transcripts of the trial court proceedings does not reveal evidence to support a finding of judicial bias or the

appearance of bias.

As such, petitioner has not shown that the Washington Court of Appeals' adjudication of his claim of judicial bias was contrary to, or an unreasonable application of, clearly established federal law as stated by the United States Supreme Court. Therefore, the Court recommends that petitioner's second ground for relief be denied.

C. Prosecutorial Misconduct

Finally, petitioner argues that his right to a fair trial was denied due to alleged prosecutorial misconduct. The Washington Court of Appeals addressed this claim as follows:

> Buckner next argues that the prosecutor improperly attempted to paint him as a criminal type during closing argument, and that he was therefore deprived of a fair trial. A prosecutor commits misconduct if his or her argument appeals to the jurors' passion and prejudice and invites them to decide the case on a basis other than the evidence. A defendant alleging prosecutorial misconduct bears the burden of showing both improper conduct and prejudicial effect.
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> One of the key issues in the trial was whether Buckner lived in the home in which cocaine, scales, and guns were found. Buckner testified that he was employed delivering liquor. In closing argument, the prosecutor pointed out that there were maps designating Buckner's delivery routes in the house, and showed the jury a picture that showed what appeared to be part of his deliveries of alcohol. Buckner argues that this was misconduct because the prosecutor was implying that he had stolen from his job. But the prosecutor made no such allegation. Rather, he simply drew a reasonable inference from the evidence, and argued that Buckner lived in the house because his belongings were in the house. This was not misconduct.
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> The prosecutor also argued that the fact that Buckner's name was not on the lease was not dispositive as to the issue of whether Buckner lived in the house. He pointed to the testimony that Buckner sometimes gave his mother cash, and that his mother sometimes paid the rent on the house. The prosecutor went on to argue that Buckner did this because he did not want his name associated with his "crack house" and that this was akin to money laundering.
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> Buckner's attorney did not object to this line of argument, although Buckner himself said "watch out" to the prosecutor. Contrary to Buckner's contention on appeal, Buckner's remark to the prosecutor did not constitute an objection. An objection must be specific enough to give the trial court the opportunity to correct the alleged error and to give the opposing party the opportunity to respond.
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> Failure to object to an improper remark constitutes a waiver of error unless the remark is so "flagrant and ill-intentioned" that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury. Even assuming that the prosecutor's references to a crack house and money laundering were arguably improper, the harm, if any, could easily have been cured by a timely and specific objection. Buckner has waived this claim of error by failing to

make such an objection at trial.

> Moreover, viewed in context, it is clear that the prosecutor was not attempting to make Buckner out as a habitual criminal, but rather was merely trying to demonstrate that Buckner lived in the house. And given that Buckner admitted he was a cocaine addict, and his mother testified that he was convicted with intent to deliver in 1988, Buckner has failed to show that the prosecutor's statements about money laundering and a crack house would have impacted the jury's verdict, even if they did tend to paint him as a criminal. Given the overwhelming evidence of Buckner's guilt, he has failed to demonstrate that he was prejudiced by the prosecutor's isolated remarks, and his claim of prosecutorial misconduct fails.

(Dkt. 10, Ex. 3, at 7-9) (internal citations omitted).

Petitioner argues that the prosecutor's comments during closing argument constituted "baseless accusations of additional uncharged crimes" and improperly "appealed to the jury's passions and prejudices by painting petitioner as a criminal type."[2] (Dkt. 6.)

In evaluating petitioner's claim of prosecutorial misconduct, "[t]he relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (*quoting Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). In addition, "the appropriate standard of review for such a claim on writ of habeas corpus is 'the narrow one of due process, and not the broad exercise of supervisory power.'" *Darden*, 477 U.S. at 181 (*quoting Donnelly*, 416 U.S. at 642).

Here, the statements made by the prosecutor do not rise to the level of a due process violation. As the Washington Court of Appeals noted, a major issue in this case was whether petitioner, who worked as a driver delivering alcohol, lived at a house where the police found cocaine, scales, and guns. In his closing argument, the prosecutor called the jury's attention to pictures showing "what appears to be part of [petitioner's] deliveries from alcohol" at this house,

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[2] In his traverse, petitioner also asserts that the Washington Court of Appeals "failed to acknowledge the argument that the prosecutor also stated that the petitioner and his mom were laundering money. Nowhere in the decision did the court address this issue." (Dkt. 14, at 13.) This argument is incorrect. As set forth above, the Washington Court of Appeals explicitly discussed the "money laundering" statement by the prosecutor.

along with maps from petitioner's delivery routes. (Dkt. 10, Ex. 15, at 91.) The prosecutor made this statement in the context of arguing that petitioner lived at this house. Following an objection by petitioner's counsel to the prosecutor's statement, the trial court stated that "[t]he jury will consider what evidence supports any argument. You may proceed." *Id.* The trial court also issued jury instructions stating that an attorney's remarks, statements and argument "are not evidence" and directed the jury to "[d]isregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court." (Dkt. 10, Ex. 19, at 3.)

Petitioner argues that the prosecutor's comments implied that he had been stealing alcohol from his employer. However, the prosecutor did not make such an express statement. At worst, the prosecutor's statement was ambiguous, and was followed immediately by an instruction from the trial court judge that the jury should "consider what evidence supports any argument." A "singular, somewhat ambiguous comment does not constitute a miscarriage of justice or an affront to the integrity of the judicial process." *United States v. Tarrazon*, 989 F.2d 1045, 1053 (9th Cir. 1993); *see also Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 898 (9th Cir. 1996) ("arguments of counsel are generally accorded less weight by the jury than the court's instructions and must be judged in the context of the entire argument and the instructions").

Petitioner points to one other statement to support his claim of prosecutorial misconduct. In closing argument, the prosecutor noted that petitioner's name was not on the lease for the house where cocaine, scales, and guns were found by the police. The prosecutor argued as follows:

> Now, his name is not on the lease. Why is that? His name is not on the lease because the defendant doesn't want his name associated with his crack house. Why does his mother pay that rent. We heard testimony about how the defendant gives his mother money in cash. He gives her money in cash, she in turn pays that rent. That is akin to laundering money. It is a way for the defendant to avoid being connected with his crack house.

(Dkt. 10, Ex. 16, at 47-48.) Following this statement by the prosecutor, petitioner himself said "watch out," but his counsel did not raise an objection. *Id.* at 48.

Because petitioner's attorney did not object, respondent argues that any claim of prosecutorial misconduct with respect to these remarks is procedurally barred.[3] *Hall v. Whitley*, 935 F.2d 164, 165 (9th Cir. 1991); *see also Rich v. Calderon*, 187 F.3d 1064, 1070 (9th Cir. 1999) (court may not review prosecutorial misconduct claims where petitioner failed to make contemporaneous objections at trial and state court consequently invoked a procedural bar to their consideration). In its decision, the Washington Court of Appeals appeared to invoke a procedural bar with respect to this claim, finding that "Buckner has waived this claim of error by failing to make such an objection at trial."[4] (Dkt. 10, Ex. 3, at 9.) As a result, petitioner may be procedurally barred from pursuing this claim in this proceeding. *See, e.g., Jackson v. Guirbino*, 364 F.3d 1002, 1006-07 (9th Cir. 2004) (habeas petitioner barred from pursuing claim of prosecutorial misconduct where he failed to object to prosecutor's statement at trial and state court deemed the claim to be waived).

Even if a procedural bar did not apply to the claim, it cannot be said that these remarks by the prosecutor "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly*, 416 U.S. at 643. "Improper argument does not, *per se*, violate a defendant's constitutional rights." *Jeffries v. Blodgett*, 5 F.3d 1180, 1191 (9th Cir. 1993). While the prosecutor's remarks regarding a "crack house" and "money laundering" were suggestive, these isolated statements were not so prejudicial in context as to constitute a due process violation. *See, e.g., Hall v. Whitley*, 935 F.2d 164, 166 (9th Cir. 1991) (dismissing prosecutorial

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[3] In cases where a prosecutorial misconduct claim is procedurally barred, petitioner must demonstrate cause and actual prejudice in order to obtain habeas relief. *Hall v. Whitley*, 935 F.2d 164, 165 n.1 (9th Cir. 1991). Here, petitioner has not shown that the prosecutor's remarks caused actual prejudice to him.

[4] After finding that petitioner had waived this claim, the Washington Court of Appeals nonetheless went on to discuss the merits of this claim, stating that "Buckner has failed to show that the prosecutor's statements about money laundering and a crack house would have impacted the jury's verdict, even if they did tend to paint him as a criminal." *Id.* However, the Ninth Circuit has indicated that the "fact that the court went on to discuss the lack of merit of some or all of the . . . claims does not eliminate the procedural bar." *Poland v. Stewart*, 169 F.3d 573, 586 n.8.

misconduct claim where remarks were "isolated moments in a three day trial").

Therefore, the Court recommends that petitioner's third ground for relief be denied. Petitioner has not met his burden of showing that the decision of the Washington Court of Appeals regarding this claim is contrary to, or an unreasonable application of, clearly established federal law as determined by the United States Supreme Court.

V. Conclusion

In light of the foregoing, it is recommended that petitioner's habeas petition be denied and this action dismissed. A proposed Order of Dismissal accompanies this Report and Recommendation.

DATED this 11th day of April, 2004.

Mary Alice Theiler
U.S. Magistrate Judge